111-22

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.—No. 826.

THE SWIFT & COURTNEY & BEECHER COMPANY,
Appellant,

vs.

THE UNITED STATES.

Brief for the Appellant.

J. W. DOUGLASS,
Attorney for Appellant.

SAM'L SHELLABARGER,
Of Counsel.

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THE SWIFT & COURTNEY & BEECHER COMPANY,
Appellant,

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Brief for the Appellant.

The appellant is a corporation organized under the laws of the State of Connecticut, and from May 6, 1870, up to November 21, 1878, and subsequently thereto, was engaged in the business of manufacturing and selling friction matches. As such manufacturer it furnished the Commissioner of Internal Revenue with its own private die for stamps to be used upon said matches.

From May 6, 1870, to November 21, 1878, appellant purchased of the said Commissioner of Internal Revenue proprietary stamps, printed from said private die, of the face value of three million eight hundred and thirty-six thousand five hundred and forty-four dollars, ($3,836,544,) paying therefor cash to the amount of $3,487,767.

During the same period the Commissioner only allowed to the claimant in stamps at their face value commissions to the amount of $348,777.

During all of the period from May 6, 1870, to November 21, 1878, there was a running account between the appellant and the United States, the creditor side showing money received by said Commissioner from claimant in various sums at various dates, and not less than $500.00 in any case, and the debtor side of the account showing that stamps were sent by the Commissioner to the claimant generally in other sums and at other dates, but never in amounts less than $500.00.

Prior to June 30, 1866, the leading manufacturers of matches, among them Mr. William H. Swift, a large stockholder in the claimant corporation, and upon its organization becoming its treasurer, made repeated protests to the officers of the Internal Revenue Bureau against the method of computing commissions for proprietary stamps sold to parties furnishing their own dies and designs. Each remittance of stamps exactly covered in face value the amount of stamps ordered by the appellant, at any time, with ten per cent. commission *in stamps, at their face value*, added.

The receipts for these stamps were upon printed blanks furnished by the defendant, (Commissioner of Internal Revenue,) and accompanied always by a letter of instructions from the Commissioner commanding the appellant to "date, sign, and transmit the enclosed receipt to" the Commissioner's office.

The appellant was further required to make a monthly return or account of the transactions, (form 55½,) and by special instruction, printed at the bottom of the form, informed that "the face value of stamps must always be inserted in the credit side of the account."

Under these circumstances the appellant brought this suit in the Court of Claims for the difference between commissions, calculated in stamps at *their face value*, and commissions calculated in money, crediting the defendant with the stamps received as commissions at the rate of ninety cents on the dollar, (*their statutory value.*) This made the claim $10 on every $1,000 of stamps ordered and received by the appellant.

To this claim as presented by the petition in the case in the Court below the defendant demurred, and the demurrer was sustained by that Court at the December Term, 1878. The claimant appealed, and the case was heard in review in this Court at the October Term, 1881, and reversed.

Upon the second trial in the Court below the defendants plead the general issue and put in evidence the contract between the parties and copies of the various printed forms for the receipts and reports required of the appellant. All of these forms were constructed and furnished by the defendants, with positive instructions what to do with them. The Court below again de-

cided against the claimant, and it appealed again; which appeal is the present pending matter.

The following extract from Section 3425 of the Revised Statutes is the material provision under which the transactions and controversy between the parties occurred:

"The proprietor of articles named in schedule A, who furnishes his own die or design for stamps to be used especially for his own * * articles, shall be allowed the following commissions: On amounts purchased at one time, * * * over five hundred dollars, ten per centum on the whole amount purchased: *Provided*, That the Commissioner may, from time to time, deliver to any manufacturer of friction or other matches, * * a suitable quantity of * * stamps * * without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary," * *

Assignments of Error.

1. The Court below erred in deciding that the "dealings were successive and independent purchases," and did not constitute a running account between the parties.

2. The Court below erred in deciding that the monthly account rendered by the appellant to the Commissioner on form 55½ was an actual monthly settlement by agreement, and constituted a monthly accord and satisfaction between the parties.

3. The Court erred in deciding that the method of computing and paying commissions to the appellant was acquiesced in by the appellant and others.

I.

In regard to the first assignment of error, it seems very clear from an examination of the specimens of the accounts rendered by the appellant, that the various purchases were not "independent successive purchases," for the very first specimen given on page 12 of the Record, paragraph 9, shows that that account on 55½ was dovetailed to the preceding month's transactions by an item of $16,475, brought along into July, 1870. And it could not be otherwise, for the appellant was entitled to 60 days' credit by

the law, and any attempt to fix a settled balance at the end of each month would have robbed the appellant of, on an average, just one-half of the time and credit allowed by the statute. The sure test of the fallacy of the Court's holding on this point is to inquire what position would the defendant have been in if it had gone into Court with a suit on the bond of the appellant for the general balance due at the end of any one given month, as shown by form 55½? Of course the United States would have been met with the irresistible answer to such an attempt, you have not complied with your own agreement, as shown by the very bond you sue on, for, instead of giving this party 60 days' credit, as allowed it by the statute, you are attempting to cut it down to one-half of its credit privilege.

The court below find expressly (paragraph 4, page 11, Record) that all the "remittances of money in payment were made * * within the sixty days' credit." That being true, it follows that there never could have been a day throughout the entire transaction when there was or could have been such a balance struck or due as could have been sued on.

A *settled account* is one that can be sued when there is a *balance due* by one of the parties thereto. But here we have an account where there was a *balance* due all of the time by one of the parties; and yet at no one moment, during years of constant dealing, could the party (United States) have sustained a suit for its balance. The account therefore must have been at all times other than a "settled account." Inasmuch as there is but one other kind of account known to the business world, or the courts—an *open* or "*running account*"—that must have been what the account in question was.

II.

It seems equally clear that the monthly account on form 55½ did not constitute a case of "accord and satisfaction" as held by the court below. It is well settled that where a *partial* payment is claimed to have been received by the creditor party in *full* settlement of his claim under the principle of "accord and satisfaction," the transaction must show that some "additional benefit was received" by the creditor. 30 *Vt.*, 424; 27 *Barb., N. Y.*, 485; 4 *Jones, N. C.*, 518; 4 *Iowa*, 49, *and Bouvier's Dic., Vol.* 1, 53.

Rose *vs.* Hall, 26, Conn., 392:

Speaking of the rule that a part payment of a debt can be no satisfaction of the whole, the court say: "That the reason given for the rule is, that the creditor's agreement is without consideration. The rule, however, supposes the part performance of the original obligation—the payment of part at the time and in the manner originally stipulated for the payment of the whole; from which payment of a part, rather than the whole, no benefit can come to the creditor, and no injury to the debtor."

Of course, in a case where the party has *expressly* agreed to take a smaller payment for a larger debt, by unequivocal words to that effect, the payment would be held sufficient. But when the alleged agreement to do so, as in this case, is only *inferential*, then there must be the clear evidence of some *benefit* resulting from the agreement to the creditor party to sustain the transaction as an instance of "accord and satisfaction." If this is the correct doctrine, how does it affect the present case? A very brief consideration of the facts of this case will give us a satisfactory answer.

The Match Co. were entitled, under the law and their bond to purchase stamps on a credit of sixty days with a premium commission of 10 per centum.

This court said on the former hearing that the dealing was "undoubtedly evidence that the appellant was willing to purchase stamps, to be paid for by a credit on account in lieu of cash for commissions; but it does not prove that he was willing to waive his right to a commission upon the stamps so purchased."

This settled two points. 1. That the commission allowed by the statute was a *money* or "cash" commission; 2., and that there must be "evidence" of a waiver of that right before the party could be deprived of it. Now, there are but two ways to waive a right known to the law. One is, by the *express, absolute* terms of a written agreement, or proved verbal agreement; and the other is by the proof of such circumstances as will compel the judicial mind to *infer* an agreement to waive. There is no pretence in this case of an *express* agreement to "waive," and if the *inferential* agreement is to be maintained, then some "benefit" to the creditor party must *distinctly* and *certainly* appear.

The facts in this case show that the creditor company (appellant), instead of being "benefitted" by an arrangement to take stamps at their *face value*, for the commissions due, would have lost $10 on every $1,000 of stamps purchased; and, as before seen,

without the "evidence" of a "benefit," the protection of "accord and satisfaction" cannot be successfully invoked by the debtor.

III.

The question, under the third assignment of error, is, did the appellant *acquiesce* in the method of computing commissions adopted by the defendant?

This, like the two preceding assignments, involves somewhat the same idea, but is looked at from a different standpoint. To this error, committeed by the court below, there are several answers, some of *fact*, as shown by the findings, and some of *law*, as shown by the adjudicated cases.

Finding III (record, p. 9,) shows the various forms for orders, receipts, reports, &c., used in the business between the parties. Do these papers prove acquiescence, as contemplated by the law?

1. The order by the appellant set out in paragraph 1, (record 9,) shows nothing of the kind.

2. The letter of the Commissioner set out in paragraph 2 (record 9,) shows nothing of the kind on the part of the appellant, but does show, on the part of the defendant, an imperative instruction to the appellant, "you will date, *sign* and *transmit* to this office by first mail the enclosed receipt."

3. Paragraph 3, of the same finding, gives the form of the receipt which, having been already *printed* and *filled up at the Department*, was sent to the appellant by the defendant, to be signed, with a note at the foot instructing the appellant that it "should be signed and forwarded to Washington by first mail." So far everything is by authority and direction of the defendant's officers. But at the conclusion of this receipt occurs the words, printed by the defendant—"in satisfaction of my orders under date of ——." Here, on these words, the court below evidently rested the weight of their opinion, emphasizing the word "satisfaction" by the use of italics. (Record, 20.) The answer to this position by the court below will be found in another finding in the case, (Finding IV., record 14,) which reads as follows:

"Prior to June 30, 1866, the leading manufacturers of matches, among whom was William H. Swift, who, upon the organization of the claimant corporation in 1870, became one of its largest

stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against the method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs."

This finding shows that the whole community of match manufacturers for years had protested against the department method of computing commissions, and of course all equally well knew that the protests had never availed them, but that the defendant steadily and peremptorily refused to change its method, as shown by the unaltered language of its forms and accompanying instructions, up to the institution of this suit and later.

Prominent among those persons who had this knowledge and who had made these vain protests was William H. Swift, the treasurer of the claimant corporation from its organization. To offset this very damaging fact to the idea of "acquiesence," showing as it does a long-continued *protest* against the method of computation, the balance of the finding is made to show that no protest or objection was made by the claimant corporation *after* its organization. Was any *after* protest necessary? Mr. Swift had repeatedly for years, with others, protested *in vain* against the method. Was it necessary that he should do the same useless thing every day of his life? Certainly not; and neither was it necessary that he should use the name of the new organization for a renewed protest, for he knew personally, as well as a matter of general history of that industry, that the department always had been and always would be deaf to all such protests. The treasurer of a company, for all *financial* purposes, is the company itself, and his knowledge is its knowledge; and it was no more necessary under these circumstances for him to protest again than it would have been necessary for him, on change of residence, to notify the department anew that his name was Swift. That was something they both knew, and a continuation of business relations between them would not require so useless an act. The law never requires a party to do a *vain thing*.

On this point the decisions of this court are continued and unequivocal.

Sims *vs.* Everhardt, 102 U. S. R., 310:

"The law does not compel the performance of a vain thing."—Strong, Justice.

Hill *vs.* Exchange Bank, 105 U. S. R., 319:

"It is a general rule that when the tender of performance of an act is necessary to the establishment of a right against another party, this tender or offer to perform is waived or becomes unnecessary when it is *reasonably certain* that the offer will be refused."—Miller, Justice.

United States *vs.* Lee, 106 U. S. R., 301 and 202:

In this case, Justice Miller, discussing the same principle as applicable to the case then in view, said: * * "The commissioners themselves having established and acted upon a rule that payment of the taxes after advertisement would be received from no one but the owner of the land, appearing in person to pay them; that if offered by his tenant, his agent, his attorney in fact duly appointed, it would be rejected, it would be an *idle ceremony* for any of these to make the offer and an actual tender by such persons, as it would certainly not be accepted, *need not be made.*"

It is very clear from the above authorities that Mr. Swift, as treasurer of the claimant, was excused from a reiterated protest, for under the circumstances of the case, as shown in the findings of fact, it was "reasonably certain," as this court said in the case of Hill *vs.* The Exchange Bank, that the protest would be disregarded.

Before leaving this point it may be well to consider for a moment what the court below said about a recent case in this court, the case of Pray *vs.* The U. S. (U. S. R., 106.) At the foot of page 21 of the Record, the last paragraph reads:

"In our opinion, under the rules laid down by the Supreme Court in this very case, as well as in the case of Frances E. Pray, * * the claimant corporation is concluded by its own agreements and settlements."

A careful reading of the decision in the Pray case shows it to be a favorable authority for the "claimant corporation," instead of hostile. In that case the claimant had for years signed receipts for salary ($2,000 per annum), excluding pay for Sundays. Afterwards he brought suit for the Sunday items, was defeated in the Court of Claims, appealed to this court, which affirmed the court below. Justice Miller, discussing the question of acquiescence, as shown by the claimant's receipts and accounts exclud-

ing the Sunday items, intimated most unmistakably that the decision of that case would have been different "*if claimant had asserted it*" (his right to the Sunday pay) "*during the early time of his service.*" The "repeated protest" of Swift and others, as shown in Finding IV of this case, made *early* in the history of the subject, is exactly that kind of *assertion* that would have made a different decision in the Pray case proper had it existed as a fact in that case. A favorable decision for the present claimant would not antagonize a syllable of the Pray decision.

Chouteau *vs.* United States, 95 U. S. R., 67:

This case, which has sometimes been thought to antagonize the present case, will, like the Pray case, when carefully observed, be found to be a "supporting authority for the present claimant on the point of acquiescence." That was a case of vouchers signed by the claimant, with language much stronger and more varied to express a final settlement or acquiescence, and this court discussing the effect of the vouchers, said: "For the voucher while in his hands had on its face the clearest statement that the sum therein allowed was 'the full and final payment on all extras and in full for all claims and demands for that work,' and if he forwarded it in this shape to his bankers to get the money on it *without protest*, he must be bound by that statement in the vouchers." Suppose the party in that case *had protested*, as the claimant, we contend, did in this, the resulting decision then, so far as the point of acquiescence or agreement controlled the case, would have been favorable to the claimant.

The next forms referred to are on page 11 of record, paragraph 5. The first is simply a letter of transmissal accompanying a draft to be placed to the claimant's credit. The next form, however, in the same page is more significant. It starts out with the imperious caption: "Authority to take credit on Form 55½," and then informs the claimant in the same imperative tone, that "credit has this day been given you on the books," &c., and that commissions at their *face value*, as shown by the figures, have been allowed; and then concludes: "You are hereby authorized to take credit for the above amount on Form 55½ for the current month." Now, if there is any "acquiescence," in the sense of two parties meeting on a fair footing and agreeing to a method of business, to be found in this form as an illustration, it is very

occult. Throughout the whole specimen under consideration runs plainly the overriding of authority—the officer ruling the individual.

Next in order comes the specimen 55½, on page 13 of the record. It will be observed that in this form, which constituted the monthly settlement referred to in the findings and opinion of the Court below, there is no acknowledgment on the part of the claimant except that it is "correct," &c., as to the items and aggregate. But it will be noticed, that by the note at the foot of the blank furnished by the defendant, the claimant was notified each time in advance that "*the face value of stamps must always be inserted in the credit side of the account.*" Here again we have the forestalling by the superior authority and opportunity. What could the claimant corporation do but submit and trust to the eventual benefit of those "repeated protests" against just that thing long before made by Swift, its subsequent treasurer, and others engaged in the same business?

The next and last specimen of the forms of account used are the *quarterly* settlements by the auditing officers of the Treasury. Why these are given in the case does not clearly appear, for the the claimant corporation had nothing to do with the auditing officers, either by "acquiescence," "agreement," or otherwise. What was done by the auditing officers was merely a review of the papers furnished by the Commissioner of Internal Revenue, and was for the purpose of settling the Commissioner's account with the Government.

In review of all these specimen forms of receipts, accounts, &c., set out in the findings and so frequently referred to in the opinion of the Court below as of significant importance in sustaining the decision there, it will be seen that grouped they constitute a marked instance of that principle of *inequality* between the parties dealing that the Courts have so frequently used as a barrier reason to prevent injustice.

Alston vs. Durant, 2 Strobh. Reps., 257:

There must be a clear difference between the "case of a public officer withholding of his own mere motion the right of a private person and a demand of one private citizen against another, with

no power beyond the ordinary modes of legal proceeding to enforce it, acquiesced in, though unlawful."

Without the protests that appear in this case, the doctrine above quoted would alone protect the claimant.

Boston Co. *vs.* Boston, 4 Metc., (Mass.), 181:

Speaking of the doctrine of voluntary payment, the court said: "The reason of the rule and its propriety are quite obvious when applied to a case of payment upon a mere demand for money, *unaccompanied by any power or authority to enforce such a demand, except by a suit at law.* In such a case * * * the parties treat with each other on *equal terms*, and if litigation is intended by the party of whom the money is demanded, it should precede payment."

Morgan *vs.* Palmer, 2 B. & C., 729:

Abbott, C. J., said: "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the *parties been on an equal footing.* But if one party has the power of saying to another that which you require shall not be done except upon the conditions which I choose to impose, no person can contend that they *stand on anything like an equal footing.*"

Can it be denied that just the power described in the above words existed in this case? The defendant made all of the blanks shown as specimens, originated and printed all the notes and instructions, and sent them to the claimant with orders on their face that *they must be used, and that expeditiously.* The very receipt on which the much-vaunted words ("in satisfaction of my order," &c.) occur, is headed: "(Office Form, No. 44—Stamp Division)." See record, 10.

IV.

Before concluding, a word should be said about the remarkable paragraph, in the opinion of the court below, at the bottom of page 20 of the record:

"These are facts from which an agreement may not only be inferred, but which must be held to constitute an explicit contract, a sale and purchase at a price fixed and agreed upon by the parties."

When this court reflects that this language is held about the sale of stamps, under a statute of the United States, which provides the price and methods in express terms, it will not wonder that we characterize the language as remarkable. What right had the Commissioner of Internal Revenue to change the "price" of stamps by "agreement" with anybody in contradiction of the law? If such an agreement was before this court in *express, undeniable terms*, it would not be recognized as effectual to vary the law. If the Commissioner could vary the price one way, he could another. Will it be contended that he could have agreed to increase the commissions to 15 or 20 per cent. on the whole amount purchased?

V.

The concluding paragraph of the opinion of the court below is as follows:

"In this result the claimant suffers no injustice. It is to be presumed from its long acquiescence in paying for stamps in the manner and to the extent shown by the findings, that it added the whole amount thus paid in taxes to the value of its articles manufactured, and charged the same to the purchasers. If so, the consumers finally paid the taxes, while the money recovered back, if any, would go not to the consumers, but to the claimant as extra and unexpected profits."

One short sentence of eight words is not sufficient to determine that a claimant who has been deprived of the use for years of thousands of dollars of his legitimate capital, "suffers no injustice thereby." Nor does it matter in this issue whether the claimant added the tax to the otherwise price of his matches or not. The present is a question of law, and is not affected by the price the matches were sold at. Neither is it a fair argument against the claimant to say that if it recovers, the sum recovered will be an "extra and unexpected profit." If the withheld commissions are recovered, the amount will be just the profit that the statute promised the claimant, and, therefore, will not be *legally* "unexpected;" and, for the same reason, should not be judicially pronounced "extra."

VI.

The VIth finding (record, page 16, shows the amount claimed by the appellant, as set forth in No. 1, of the two statements given, to wit: $34,878.00.

No. 2 of the statements, which gives the figure at $28,616.00, is based upon the idea that the claimant is limited to *six years* (statute of limitations in the Court of Claims); but the account being a running one, the statute would only start Nov. 21, 1878 (sixty days before action brought), and therefore could have no operation in the case.

J. W. DOUGLASS,
Attorney for Claimant.

SAM'L SHELLABARGER,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 826.

SWIFT AND COURTNEY AND BEECHER COMPANY

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT

BY

SAMUEL SHELLABARGER.

WASHINGTON, D. C.:
C. W. BROWN, PRINTER, 923 F STREET, NORTHWEST.
1884.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 826.

THE SWIFT AND COURTNEY AND BEECHER CO.,
APPELLANT,
v.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FACTS FOUND BY COURT OF CLAIMS.

The substance condensed of the findings of fact by the Court of Claims we restate thus, so far as the same are material:

I.

Claimant, a duly organized corporation from April 20, 1870, to December 20, 1878, and afterwards, was a manufacturer of friction matches, furnishing, without expense to the United States, in suitable form approved by the commissioners, its own dies and stamps.

II.

May 17, 1870, the company furnished bond with security in $30,000 to the United States upon conditions set out in bond, amongst which conditions was one providing that "on

"or before the tenth day of each and every month obligors "would make a statement of their account upon Form "55—1–2 of Internal Revenue Bureau, and on such other form "or forms as might be added or substituted therefor. "showing the balance due at the commencement of the "month, the amount of stamps received, and the amount of "money remitted by them during the month, and the bal- "ance due from Swift & Courtney & Beecher Co. at the "close of the month preceding, * * * * and shall do "and perform all other acts of them required," etc., etc. Other similar bonds were given May 24, 1870; February 29, 1872; December 14, 1872.

III.

The uniform course of business between the parties in relation to ordering and forwarding, making returns and accounting, and paying for stamps, was,

(1.) When stamps were desired, to forward an order in the form set forth in finding 3, (Rec., p. 9) which reads:

"Please forward us by express $3,000 worth of match stamps S. & C., 1 c., and oblige,

"Yours truly,

"The Swift & Courtney & Beecher Co.,

"L. S. Benton, *Att'y.*"

(2.) The commissioner, in reply, forwarded stamps of the *face value* of amount and ten per cent. commissions on the money specified in the order, accompanied by a letter, such as is set out on top of page 10, the substance of which letter is a statement of the forwarding of stamps of face value of the money sent in the order to which the letter was a reply, plus ten per cent. commission on amount of money specified in the order, such letter stating that the amount sent was "in satisfaction of order No. ——," the letter commanding the company, "if invoice is found correct, you will "date, sign and transmit to this office by first mail the en- "closed receipt."

(3.) This receipt *was one prepared and filled up by the Com-*

missioner, except date and signature, and forwarded to corporation and by it signed and returned, and is given on page 10 of the record, and reads:

"Your letter of the —— has been received. I am also in receipt of U. S. Internal Revenue stamps therein referred to, amounting to $3,300," (or a sum equal to the amount of ten per cent. commission on the amount of money specified in the order), "in satisfaction of my order under date of ——," signed by corporation. A printed note at the bottom of this receipt requires the signature to be legally and technically correct.

(4.) Claimant availed himself of the 60 day statutory credit allowed. No order was ever for less than $500, face value. Remittances in payment for stamps were made in various sums from time to time within the 60 days credit.

Each remittance was for a sum not less than $500, *and did not specify and correspond to any one particular specified order for stamps*, but did apply to orders, the times of payment of which were near maturity.

These remittances were so made that all stamps received were thus paid for at or before the expiration of the term of credit.

The claimant was always indebted to defendant for stamps received within the past 60 days, the time for payment for which had not matured, but was never indebted for any stamps received more than 60 days previous.

(5.) Remittances of money and acknowledgment of receipt therefor were made in the form set out on page 11 of the records. The remittance letter reads:

"Enclosed please find Asst. Treas. —— C. D., No. ——, for —— dollars, which pass to our credit;" signed by corporation.

The acknowledgment by the bureau was on the printed form, 80 record, page 11, and was as follows:

"Sir: The following credit has this day been given you on the books of this office *on account of* Internal Revenue adhesive stamps, namely, by duplicate certificate of deposit No. —— of Asst. Treas. ——, dated ——, for —— dol-

lars; commission @ 10 per cent., —— dollars; total, —— dollars. You are hereby authorized to take credit for the above amount on form $55\frac{1}{2}$ for the current month.

"Very respectfully,

"————————, *Commissioner.*"

(6.) In compliance with the directions thus given by the commissioner and form $55\frac{1}{2}$ the complainant made its first return July 8, 1870, and regularly thereafter each month during the whole period, and these returns, with like statements in gross, made by the Commissioner were forwarded by the Commissioner to the Auditor of the Treasury and accounts thereon were from time to time stated by the Auditor and transmitted to the First Comptroller, by whom the balances found due were certified in the manner that amounts are adjusted and settled in the Treasury Department.

(7.) From the commencement the Commissioner held that the amount allowed by statute was to be computed as commissions upon the amount of money paid, and all business between the parties was transacted and all accounts were stated and adjusted by the accounting officer on that basis.

(8.) The blank forms of $55\frac{1}{2}$ were furnished by the Commissioner to the claimant, who filled them up and returned them in accordance with the Commissioner's direction and decision.

(9.) The first return on form $55\frac{1}{2}$ in which commissions were stated is given at the bottom of page 12 of the record, and is dated July 31, 1870.

(10.) The first return made before the commencement of this action was dated December 31, 1878, and is given on page 13 of the record. On the debtor side of these returns made under form $55\frac{1}{2}$ the government is debited with cash deposited by claimant as per certificates of deposit forwarded; also with ten per cent. commission on the amount of money embraced in the certificates of deposit. On the credit of this form $55\frac{1}{2}$ the government is credited with balance due last month; also stamps received at various times

of their receipt by claimant. Below this monthly statement of account the printed words were "the above ac-"count is correct, complete and true." A printed note was on this form 55½, which gave peremptory orders in these words: "*The face value of stamps must always be inserted in the* "*credit side of this account.*"

The intervening returns were in like form like those above named.

(11.) On page 13 is given the form of settlement by the accounting officers and which settlement was made upon the same principles as those stated in form No. 55½.

VI.

The leading manufacturers of matches and also William H. Swift, who, on the organization of the complainant corporation in 1870, became one of its largest stockholders and treasurer, made repeated protest to the officers of the internal revenue bureau against the method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs, but it does not appear that the corporation after its organization made any protest or objection against the method adopted by the Treasury Department for computation of commissions or made claim to any allowance on account thereof until January 8, 1879, and the correspondence, when this first claim was presented on the 8th of January, 1879, is given on page 15 of the record. The residue of the findings of fact relate wholly to the amounts of stamps purchased and commissions allowed.

ARGUMENT.

NO SALE AND PURCHASE AT A FIXED PRICE.

It is asserted by the government that these facts show two things which furnish a defense in the present case, namely, that they show an agreement between the claimant and defendant that the sales of stamps were made at a price equal to the face of the stamps, less the statutory commis-

sion of ten per cent., but payable in stamps at their face value, such commission so payable in stamps being equal to to ten per cent. on the amount of money sent, and not ten per cent. on the face value of the stamps, and not a commission payable in money; and, second, that this method of transacting the business was acquiesced in by claimant, and amounts in law to a monthly settlement constituting an accord and satisfaction for each month, and that each and either of these facts so established by the evidence constitutes a defense to the action.

Neither of these propositions, we submit, can be maintained under the law and the facts so found.

We reply to each of the arguments asserting these two defenses, and say:

First, that so far as reliance is had upon the terms of the bond for security given where it calls for monthly settlements upon form 55½, which should show the balance due at the commencement of each month, the amount of stamps received and money remitted during the month, and the balance due at the close of the preceding month, and upon said course of business acquiesced in, that such reliance is unsound as tending to establish an express contract for the purchase of stamps at the rates established by the practice of the Department, to wit, the ten per cent. commission payable in stamps at their face on the amount of money paid, instead of on the face value of the stamps.

It was held by the Court of Claims that—

"These are facts from which an agreement may not only be inferred, but which must be held to constitute an explicit contract and sale and purchase at a price fixed and agreed upon by the parties."

Please observe that we are now upon the point that these facts can not be held to constitute an express contract at an agreed price different from that fixed by law as distinguished from their bearing as tending to establish an accord and satisfaction made regarding a disputed claim.

One of the reasons why this position, that an express con-

tract is established for the sale of stamps at a price prohibited by law as distinguished from an accord and satisfaction, is that such an agreement is in law impossible. No officer of the Government is allowed to make a contract in violation of law, no odds how beneficial the contract may be to the Government or how much better it may be for the Government than the contract would have been if made according to law. This is exceedingly familiar and self-evident law.

In holding to this doctrine in the case of Filor *v.* The U. S., 9 Wall, 45–49, this Court, in setting aside an illegal contract, announces the doctrine which we have just stated in these words:

"The unauthorized acts (of officers of the United States) cannot estop the Government from insisting upon their invalidity, however beneficial they may have proved to the United States."

The same thing is decided in substance in
Parish et al. *v.* the U. S., 8 Wall., 489.
U. S. *v.* the City Bank, 6 McLean, 130.

In Hunter *v.* the U. S., 5 Pet., 173–188, this Court expresses the same doctrine in these words:

"An officer can only bind the Government by acts which come within a just exercise of his official power."

The same thing is in Johnson *v.* the U. S., 5 Mason, 425. The same thing is in Lee *v.* Monroe, 5 Cran., 366. See also Curtis *v.* the U. S., 2 Ct. Clms., 144. The same thing in 9 Opinions of the Att'y Gen'l, 18.

This rule that an officer cannot go beyond his statutory authority is so strong that, as declared by this Court in Hawkins *v.* the U. S., 96 U. S., 691, "individuals as well as "courts must take notice of the extent of the authority "conferred by law upon the person acting in official capacity, "and the rule applies in such cases that ignorance of the law "furnishes no excuse for any mistake or wrongful act."

See same thing in Whiteside *v.* the U. S., 93 U. S., 247.

ing simply of the question whether the petition showed facts establishing a contract or agreement of compromise in which the statutory rights of the claimant had been *waived*. So the Court expressly says at the bottom of page 695.

We are therefore relieved from the further discussion of the point, do the facts found by the Court of Claims establish, in this case, such a contract fixing the price of the stamps, as the Court of Claims, at the bottom of page 20 of the record, finds to be established by the said facts. Such a contract is one impossible in law because prohibited by law.

NO ACCORD AND SATISFACTION.

Therefore, the only question left for discussion in the case is whether the facts found by the Court of Claims are such as amount to an accord and satisfaction, or to a compromise of a disputed claim? In other words and in the words of this Court, 105 U. S., bottom of page 695, we are brought to the question whether these facts found by the Court of Claims show that the claimant "was willing to *waive* "his rights to a commission upon the stamps so purchased?" Do they show that he is deprived of his statutory right because the facts shown show that he waived his rights by an actual settlement based upon the understanding that he was waiving his said statutory rights?

We submit that the facts found by the Court of Claims do not show such a contract of compromise or intention to *waive* his statutory right.

REVIEW OF THE CASES.

We now proceed, first, to a condensed statement of the cases in this Court where it has passed upon the question as to what elements, entering into a compromise contract with the Government, shall be held to make an accord and satisfaction, such as shall preclude a further recovery upon the claim so compromised; and shall then attempt assertion

whether these requisite elements have entered into the present alleged accord and satisfaction.

United States *vs.* Child & Co., 12 Wall, 232–245, is, on this point, a leading case; and the doctrine of that case is fully stated on page 245.

In that case the Court puts especial stress upon the fact that there the claimant voluntarily submitted his claim to a Commission, appointed by the Government, to finally determine the amount due on the claim, and then the Court states what it is, in the case, which made it a valid compromise in the following words:

"There was a claim, the justice of which had been denied, and the amount that was due on it had been *in dispute* for nearly two years. The Government says to the claimants: 'We will pay you a certain sum on this disputed claim, provided you will take it in full satisfaction of the whole;' when, without intimidation, without fraud or concealment on the part of the Government, *without protest or objection* on their part, the claimants accept the money offered, and sign a receipt acknowledging it to be in full of the whole claim; is not this a legal and binding compromise of a disputed claim?"

On page 244, the Court expressly refers to the cases of accord, and indicates that the Court held that the ordinary principles of accord and satisfaction, at common law, as applied in the Courts between man and man, are the ones the Court held to be applicable, in that case, to a settlement with the Government.

It holds, therefore, that an accord and satisfaction was made out by the facts (1) that the claim was in dispute; (2) that the amount due was uncertain and unliquidated; (3) that the party assented to its liquidation by a Government commission, which did liquidate it; (4) that this was accepted with full knowledge of all facts, and without fraud or concealment; (5) that a receipt for the amount awarded was given, as in full, and, (6) that there was, at the receipt, *no objection or protest.*

Such is this leading case.

In United States *v.* Clyde, (13 Wall., 35) the case of United States *v.* Child *et al.*, is reaffirmed, and the stress of the case is put on the fact that there was "clearly a disputed "claim," and that claimant knowing "the change of terms "for the service of the boat, the boat was permitted to "remain in the service under these reduced rates," and that they made an acquiescence in the changed rate, (*a rate lawful to be made*), and then gave his receipt in full for the amount due under this changed rate.

This was held to be a compromise.

In United States *v.* Justice, 14 Wall., 535–549, is like the case of Child, (12 Wall., 232), except that there was no receipt given, and the case was rested on the two facts that the claimant had submitted his claim to a Commission for liquidation, and had accepted, without protest, the sum awarded. Upon the point of the absence of all protest, this Court says (p. 549):

"He can refuse to receive it," (the amount awarded) "or *can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the government that the compromise is rejected*, and this rejection leaves the claimant free to litigate," etc.

And this Court rests its decision on the doctrines of the case of Adams, 7 Wall., 463; and Child, 12 Wall., 232.

In Mason *v.* United States, 17 Wall., 67, is one where a claim was made by the United States that Mason had waived an old contract for furnishing arms, and accepted a new one by reason of his voluntarily executing a bond, which was required by the decision of a Commission, appointed by the Secretary of War, to adjust all claims on that Department; and which Commission had, without Mason's assent, decided that a modified contract be awarded him, on his giving a bond for performance of the modified contract.

The Court here says (p. 73):

"Nor can such commission compel a claimant to appear before them and litigate his claim; but if he does appear and prosecute it, or subsequently accept the terms awarded

as a final settlement of the controversy, *without protest*, he must be understood as having precluded himself from further litigation."

In this case the Chief Justice dissented.

In Piatts, adm'r, *v.* U. S., (22 Wall., 496,) this Court held there was no accord; and in explaining the previous cases the Court (p. 509) says, speaking of the cases where parties had accepted the amounts awarded by commissions empowered to make full settlements:

"Claimants in such cases may appear before the commission or not, as they choose, but the decision is, if they do appear and accept the terms awarded, as a final settlement of the controversy, *without protest*, they must be understood as having precluded themselves from further claim and litigation."

But in that case the Court held no compromise, though the amount awarded by accounting officers was accepted, because the submission made by the special act of Congress did not submit the part of the claim now sued for.

In Savages, ext'r, *v.* U. S., (2 Otto, 382,) this Court held that one, with full knowledge that the payment of U. S. treasury notes held by him, and which payment he accepted and surrendered said notes, was tendered as a full discharge of these notes, (pp. 386–7) did by such acceptance and surrender waive their payment in gold. The Court says (p. 386) "the effect of the acceptance of currency notes "in payment might possibly have been different" had he not surrendered the notes. Regarding the effect of the protest made by claimant at the surrender of the notes the Court says (pp. 387–389): "The protest is wholly insufficient "to qualify the *absolute and unconditional surrender of the "treasury notes*." * * * They surrendered the securities "and asked leave to enter a protest in the same communi- "cation, which was in effect saying: 'Our principal still "thinks he ought to be paid in gold; but inasmuch as the "department declines to pay in that medium he has decided "to accept payment in the medium which you propose.'"

The Court then likens the case to that of a vendor of a chattel who asked 100 dollars therefor, and was offered 90 dollars, which the vendor declined, but afterwards forwarded to the vendor the chattel, accompanied by a letter accepting the offer of 90 dollars, but therein protesting that he ought to have the 100 dollars—the Court remarking that this protest "would not have the effect to qualify the ac-"ceptance of the offer and the unconditional delivery of "the article."

This case, therefore, is one holding simply that there was an unconditional sale of the treasury notes, and an absolute delivery of them at an agreed price. It was one where the party selling was at perfect liberty to do as he pleased with his own property, and was under no sort of necessity to conform to the offer of the government to pay currency; and where, therefore, his sale, and absolute delivery of the notes, was a waiver of his right to gold, and his "protest" that he ought to have more, did not overcome the waiver arising out of the two facts of an unconstrained acceptance of currency in full and out of the unconditional surrender of the notes.

In United States *v.* Martin (4 Otto, 400) one who, under the eight hour law, sued for the difference of pay per day, which would arise out of regarding eight hours a full day instead of twelve hours, the Court held that he had contracted to work twelve hours; that such contract was lawful, and his wages, as already paid were reasonable, and, besides, held that as he, in 1873, applied for the same arrears of pay as are here in question and received from the Auditor an award of $205.63, and that amount was paid to claimant and he receipted in writing in full for account, such facts made a "bar to any further claim."

In Choteau *v.* U. S., (5 Otto, 61-67,) the Court, in holding that the receipt of the money for building a war vessel, which the government asserted to be all that was due, and in giving a receipt therefor, expressed to be "the full and pay-"ment on all extras, and in full for all claims and demands "for that work," and which receipt the claimant forwarded

to his bankers to get the money on it, *without protest*, operated as binding on the claimant and barred the claim for extras.

In United States *v.* Adams (7 Wall., 463–478) the claimant submitted to a commission appointed by the Secretary of War to examine and report upon all unsettled claims, &c.; (p. 465) and to that commission the claimant submitted his claim and received the amount awarded, and then sued for a balance of the contract price not allowed and paid.

On page 479 the Court states the full effect of the decision in these words:

"It has been argued * * * that a receipt for payment in full when only a part of the debt has been paid is no defense to an action for the balance; and further that it was signed under protest. In the view we take of the case the giving of this receipt is of no legal importance. The bar to any further legal demand against the government *does not rest on this acquittance*, but upon the voluntary submission of the claims to the board; the hearing, the final decission thereon, the receipt of the vouchers containing the sum or amount found due to the claimant, and the acceptance of the payment of that amount under the act providing therefor."

In Pry *vs.* the United States, 106 U. S., R. 549, an occasional weigher was appointed at $2,000 per annum *when employed*. He was paid at this rate, deducting Sundays. This Court held that, as "he made out his own bills in his own "name for his services as occasional weigher for each month, "excepting therefrom Sundays, and accepts and signs receipts "for these bills so made out therefor, he cannot afterwards "claim for the Sundays so by his own construction of his "contract excluded."

The Court says on these facts (p. 595): "He cannot be "permitted now to say, after he is out of that employment, "that his contract was for $2,000 a year as an absolute sal-"ary."

We think the cases now gone over, if not all that exist, in the decisions of this Court, having closer bearing on the present case, are, at all events, enough to bring to mind fully

every view and phase of the question as to what elements are requisite to make out such an "accord and satisfaction," as is relied on to defeat the present action, and as to what will not do so.

THE EFFECT OF THE AUTHORITIES.

These cases, as seem to me, when taken together, result in establishing the following propositions, having direct bearing on the present case:

(1.) That the absence of a protest at the time of receiving the lesser sum in apparent satisfaction of a larger claim, is not, *taken alone*, conclusive of the discharge of the entire claim, but such facts of acceptance of the smaller sum, and failure to protest, may be overcome by the other facts in the case, showing that the transaction did not, or ought not to, release the entire claim. (Piatt's case, 22 Wall., 496.)

(2.) That the giving of a receipt, when given under the demand of the Government as a thing required in the regular routine of Government regulations, and in order to go on with claimant's business, has little significance, and has been generally disregarded by this Court.

United States *vs.* Adams, 7 Wall., 479.
United States *vs.* Child, 12 Wall., 241.

(3.) That this Court distinctly asserts its intention to apply to cases of alleged "accord and satisfaction" where the Government is a party, the rules regarding the effect of receipts for a smaller sum in discharge of a larger one, and the other elements, making a valid "accord and satisfaction," rules of common law *at least* as favorable to the citizen as apply at common law between private parties acting under like conditions.

United States *vs.* Child, 12 Wall., 244.
Mason *vs.* U. S., 17 Wall., 74.

(4.) The fact that the amount of the claim or its validity

was in dispute, and that the settlement of the *dispute* made part or all of the consideration for the release, is a controlling element in the case.

United States *vs.* Child, 12 Wall., 245.

(5.) That in all the cases the ultimate question is not as to the matter of the presence or absence of a "protest" or a "receipt" or any other one thing, but, on the contrary, always is, *do the acts of the claimant proved, and which acts were done* (as expressed by this Court, 12 Wall., 245) "*without intimidation and without fraud or concealment on the part of the Government,*" *establish a free and voluntary assent or agreement to release the disputed claim, the party releasing having full knowledge of all the material facts; and also* that an "*actual settlement*" or release (15 Otto, 696) was made by or under such agreement?

We submit that this Court, in the present case (105 U. S., R. 695) has laid down this very rule, being the one derivable from all the cases.

The Court there, in speaking of what the case is as presented in the petition demurred to, and touching what will be regarded as in law a waiver of the right to commissions as fixed by the statute, uses this language in speaking of the course of dealing described in the petition. The Court says:

"But it (the course of dealing) does not prove that he was willing to *waive* his right to a commission upon the stamps so purchased; and it would be incumbent on the Government, in order to deprive him of his statutory right, not only to show facts from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding. The allegations in the petition, in our opinion, do not constitute such a bar to the recovery sought, and the demurrer interposed should not, therefore, have been sustained."

And this amounts to a declaration by this Court that in order to constitute an accord and satisfaction the facts found must not only show an agreement to waive his statutory right to the commission, but must also show "*an actual settlement based upon such understanding.*"

We have already above remarked that the decisions of this Court recognized, in this class of cases, that the ordinary rules of the common law, in regard to what constitutes a good accord and satisfaction of a larger debt through the acceptance of a smaller one, are the rules which this Court applies to such cases; the Court assuming that in such settlements or accords and satisfactions the party acted freely and voluntarily from full knowledge of the fact and was under no constraint in regard to the matter.

Turning now to the rule of the common law in regard to such alleged settlements, we find the rule stated by Mr. Parsons in his work on Contracts, vol. 2, side page 618, 6th Ed., in these words:

"It has been said that the payment of a part of a debt, or of liquidated damages, is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand; and a plea of payment of a small sum in satisfaction of a larger is bad, even after verdict."

And in the same work, vol. 2, p. 686, note t, the rule is stated thus:

"Thus, it is settled that a mere receipt by a creditor of a part of his debt, then due, is not a good defense, by way of accord and satisfaction, to an action for the remainder, although the creditor agreed to receive it in full satisfaction."

To this the author cites:

Warren *v.* Skinner, 20 Conn., 559.
Daniels *v.* Hatch, 1 N. J., 391.
Adams *v.* Tapling, 4 Mod., 88.
Worthington *v.* Wigley, 3 Bing., N. C., 454.
Smith *v.* Bartholomew, 1 Met., 276.
Mitchell *v.* Cragg, 10 M. & W., 367.
Greenwood *v.* Lidbetter, 12 Price, 183.
Hinckley *v.* Arey, 27 Me., 362.
Hardy *v.* Coe, 5 Gill, 189.
White *v.* Jordon, 27 Me., 370.
Eve *v.* Moseley, 2 Strobh., 203.

In note "w.," 2 Parsons on Contract, 618, further cases are cited:

Thomas *v.* Heathorn, 2 B. & C., 477.
Fitch *v.* Sutton, 5 East., 230.
Blanchard *v.* Noyes, 3 N. H., 518.
Wheeler *v.* Wheeler, 11 Vt., 60.
Bailey *v.* Day, 26 Me., 88.
Down *v.* Hatcher, 10 A. & E., 121.
Geiser *v.* Kershner, 4 Gill & J., 305.
Watkinson *v.* Inglesley, 5 Johns., 386.
Dederick *v.* Leman, 9 Johns., 333.
Seymour *v.* Minturn, 17 Johns., 169.

In the case of Harriman *v.* Harriman, 12 Gray, 341, this rule is stated by the Court in these words:

"The rule of law which was applied to the present case by the Superior Court is too well settled to be open to all those considerations which might be urged if it were a new question. That the acceptance of a less sum in money than is actually due cannot be a satisfaction, and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon that condition, is, as we understand, a correct exposition of the law on the subject. In Brooks *v.* White, 2 Mch., 283, it was so assumed and stated upon the authority of the adjudicated cases there cited and commented upon."

That this rule is as stated in the above cited note t a settled one, will not be, we suppose, questioned. (See also cases cited in the brief, pp. 4, 5.) But the effort will be to bring the case within the exceptions to the rule and make it a case where the parties have compromised a disputed claim, and where the settlement of the dispute furnishes a consideration for receiving the less sum in satisfaction of the greater. And we now turn to the question whether the facts found by the Court of Claims bring the case within this or any other exception to the rule.

SUBSTANCE OF FACTS FOUND ON EACH SIDE.

From the recital of the facts already found, it appears

that the facts relied upon as showing a good accord and satisfaction may be summed up as follows:

(1.) That the bond required, in order to get the 60 days security, (R., pp. 8 and 9), requires of claimants in each month a statement of their account upon form 55½, showing the balance due at the commencement of the month, the amount of stamps received, and the amount of money remitted by them during the month, and the balance due from the company at the close of the next preceding month.

(2.) That the instructions in the Commissioner's letter, form 113, (R., p. 10), accompanying the forwarding of stamps, says that the stamps transmitted are in satisfaction of the order No. ——, and requiring a receipt to be executed of the kind described in form 44 (R., p. 10), which receipt says that the stamps so received are "in satisfaction of my order under date of ——."

(3.) That in obedience to the requirements of the bond, and in obedience to the directions contained in official form No. 80 (R., p. 11), the claimant in each month, during the period covered by the petition, made the returns on said form 55½, such commissions paid in stamps.

(4.) That these monthly returns showed that claimant was allowed in stamps ten per cent. on the money paid, and not upon the face value of the stamps.

(5.) That this method of making settlements upon the said basis was continued throughout the said period covered by the petition, without any protest or objection on the part of the claimant, (R., p. 15), until the 8th of January, 1879.

These, in substance, are the facts relied upon as making out the accord and satisfaction, and also making out the sale and purchase at a price fixed and agreed upon by the parties, which is alluded to by the Court of Claims, (R., bottom of p. 20.)

Countervailing Facts.

The countervailing facts relied on by the claimant, and which are in part found by the Court of Claims, and in part

arise out of and appear upon the face of the transactions so established by the Court of Claims, are as follows:

(1.) That the settlement required by the terms of the bond given as security (R., pp. 8 and 9), does not require that the settlement should be upon an illegal basis, and the bond contains no agreement to that effect.

(2.) That the receipt given, being official form 44 (R., p. 10), was prepared and filled up by the Commissioner, except the date and signature, and forwarded to the claimant corporation (R., p. 10.)

(3.) That this receipt was peremptorily required to be signed by the letter of the Commissioners, printed form No. 113, (R., p. 10), and claimant had no option in regard to the form of the receipt, or the signing thereof.

(4.) That the form of the monthly returns required, to wit: Form 55½, were blank forms furnished by the Commissioner to the claimant which they were required to adopt and use in making their monthly returns. (R., p. 12.)

(5.) That these forms were used in compliance with the directions given by the Commissioner and with form 55½ (R., p. 12).

(6.) That prior to June, 1866, the leading manufacturers of matches, amongst whom was William H. Swift, who, upon the organization of the complainant corporation in 1870, became one of its largest stockholders and treasurer, made repeated protest, to the officers of the Internal Revenue, against the methods of computing commissions on proprietary stamps sold to those who furnished their dies and designs.

(7.) That there is no dispute in regard to the amount of money that was paid during the period covered by the petition for stamps, but said amount of money was at all times exactly known and undisputed, and the amount of commissions, to which claimant was entitled, was therefore a known, exact or liquidated sum, about which there was no controversy, the whole controversy being in regard to what amount the statute allowed, to wit: whether ten per cent. in money

on the face value of the stamps, or, on the other hand, ten per cent. in stamps, on the face value of the stamps furnished, and therefore the amount of commissions to which the claimant was at all times entitled, under the true construction of the statute, was a liquidated sum, and not disputed or uncertain in its amounts, except the uncertainty arising out of the true construction of the statute; in other words, the amount of the claim of the claimant was never a disputed amount, but was a liquidated one under either view of the statute: either that taken by the Commissioner, or that settled by the decision of this Court.

(8.) From the commencement and before the organization of the claimant corporation, the Commissioner of Internal Revenue held that the amount allowed by the statute was to be computed as commissions upon the amount of money paid, and business between the parties was transacted on that basis.

(9.) The claimant corporation, at and before the commencement of the period covered by the petition, knew that such had been the ruling and settled practice of the Internal Revenue Bureau, and had made repeated protests against the Commissioner's interpretation of the statute, without avail. (R., p. 14).

(10.) From these facts, and the law in the case, of which this Court will take notice, it results that claimant had no option in regard to complying with the aforesaid requirements and directions of the Commissioner, and in giving said bond, in making said monthly returns upon form $55\frac{1}{2}$ and in executing said receipt on form 44, except either to yield to said requirements, or, on the other hand, to discontinue their business. They could buy stamps at no other place, and in no other way, except under the said requirements, and they could not continue their business without the use of said stamps, which could be procured in no other way than in the methods described above, and upon making the returns and giving the receipts above stated.

(11.) That in making purchases of stamps and in remit-

ting money therefor, no sum was remitted at any one time for less than $500, and no remittance specified or corresponded to any one particular and specified order for stamps. (R., p. 11). And the account between the Government and the claimant was therefore a running account, each credit to the claimant being placed to the debtor side of the Government's account with claimant, under form 55½, and each remittance of stamps being put on the credit side, and no actual closing of accounts between the Government and the claimant, during the period covered by the petition, was effected otherwise than by carrying the balances, due to the Government at the end of each month, forwarded into the account for the next month on the monthly returns made on form 55½.

This is the substance of the facts on each side of the case, and the question we are brought to now, in view of the principles of law which we have gone over, and of the facts now stated on each side is, do such facts make out, as against the claimant, a valid promise or accord and satisfaction, which cuts off his right to that exact and liquidated sum which has, at all times, been due him, unless he is deprived thereof by such alleged accord and satisfaction, and we now proceed to state the legal view on which we assert that no such accord and satisfaction is established.

WHAT SWIFT ET. ALS. *vs.* UNITED STATES, 105 U. S. R., DECIDES.

I.

We submit that the facts found by the Court of Claims as bearing upon the alleged settlements or accord and satisfaction, and which did not, in substance, appear in the petition demurred to (105 U. S. R., 691), are not such as materially change the case as to the alleged accord and satisfaction, and hence the case in 105 U. S. R., 691 rules the case in its present aspects.

The facts shown by the petition bearing on the alleged accord and satisfaction are:

(1.) The requirements of the statute (R. S., 3425) were the same on the trial of the demurrer as now, and were stated in the petition (R. 1-2), and this statute required a bond insuring payments of credits given for not exceeding sixty days within each sixty. In other words, this Court, in deciding this demurrer, had before it the fact that the law and the bond compelled the price of all stamps and all commissions to be ascertained and fixed, and these to be adjusted from time to time as the business proceeded, and that such payments should be, and were, made based upon said fixing of prices and amounts of commissions as that no purchase of stamps on credit should go unpaid for a period in excess of sixty days. This *degree* and *sort* of "sale and purchase at a fixed price agreed upon by the parties" (R., bottom p. 92) was therefore passed upon by this Court; and the Court *must*, in overruling the demurrer, have held that such acquiescence in the prices, so fixed and paid within the sixty days, made out no "explicit contract," or sale and purchase at a price agreed upon by the parties.

(2.) That the allowance of commissions and the price of stamps, so fixed on by the Commissioner and paid by the claimant, was a deduction from face of the stamps furnished, of ten per cent., paid in stamps, on the money paid, and not on face of the stamps, and this was in accordance with the uniform practice of the office from its organization; and these allowances, on this basis, are these made to claimant from 6th May, 1870, to 24th December, 1878 (R. 2-3); and this was, before 1870 (from 1866) known to claimant; and also that protests against such interpretation of the statutes prior to 1866, and none thereafter.

So that, in deciding the demurrer, this Court passed upon the legal effect of these facts: (1) That claimant knew the settled practice was to allow only what was allowed. (2) He gave the bond (3), made the purchase, and (4) took the credits, and (5) made the payments within the sixty days at the said rates so allowed, and (6) made no protests after 1866.

(3.) This petition further showed to this Court (R. 2) that said price of stamps and allowance of commission were fixed by Commissioner and known to claimant, as the business progressed, in another way, namely: by the averment as to how the stamps were ordered, money sent and stamps forwarded and the debits and credits entered on different days of "every month," of the period from 6th May, 1870 to 24th December, 1878—the credit side showing the moneys received and the debtor side showing the stamps that were sent at different times.

The result of all these elements of the petition is this:

1. It showed that the amount of commissions allowed *must* be fixed as the business proceeded, so that the amounts to be paid within each credit given of 60 days could be known and paid off.

2. It showed that these were fixed and payments made on that basis.

3. It showed that the ruling was known to claimant as a settled one before 1870, and that he acquiesced in it so far as to bow to it as one he could not change.

4. It showed that no protests were made during all that period from 6th May, 1870, to 24th December, 1878, and that said payments in full during each sixty days credit were made, without protest, at the time, with that knowledge, and on that allowance.

5. It showed just how the debits and credits were kept on the books, and that it was such as is disclosed on form of returns 55½.

Now, the only things which this petition demurred to did not disclose to this Court, having any significance, as bearing on an "accord" or "a sale and purchase at a fixed price" (R. 20) are the two, to wit, (1) the making, on form 55½, of monthly returns, in which the balance due the Government, at the end of the preceding month, appeared as a credit to the Government, and (2) the giving, at the receipt of each remittance of stamps, of the printed receipt on form 44 (R. 10) in satisfaction of a named order for stamps.

Now, we submit with the utmost confidence, that both of these two elements of alleged "accord" did, in the legal effect, fully appear in the petition demurred to. These show no *more* than that prices of stamps and commissions were fixed, as the business progressed, that the amounts due were, on the Commissioner's erroneous basis, ascertained from time to time (every *sixty* days at least, as per the petition, and every *month*, as per the facts found by the Court of Claims), and that claimant, without protest at the time, acquiesced in and paid off these sixty days' credits as fast as they matured, and paid them at said price.

It was, in this Court, insisted (105 U. S. R., top of p. 695) that "this course of dealing was well known to appellant, in "and by which it accepted stamps at their face value in pay- "ment of its commissions, which it is not at liberty now to "open, question or reverse."

But this Court wholly rejected this view, and regarded said facts as showing that the business was conducted on the footing of a "running account;" and you held that said facts *did not show that claimant was willing to waive his right to a commission upon the stamps so purchased.*

Now, we insist that the *added* facts shown in these findings of fact, and which were not in the said petition, do not change the force of the facts passed on by this Court in any legal sense, and hence the case is ruled by what this Court has already decided in this very case.

But we now turn to the inquiry, what is the legal effect, as viewed in the light of other cases, than that of Swift et als., 105 U. S. R., of these facts so found by Court of Claims, and which are claimed as not embraced in the petition demurred to?

In deciding on what effect you will give to these facts found, please keep in mind the following things:

1. That the amounts sued for and withheld were ascertained and liquidated and were kept back solely on the ground of a wrong interpretation of the statute.

2. That the wrong construction was so thoroughly fixed

and settled that it had been, without change, adhered to from the organization of the bureau, and so fixed that the Commissioner declared that nothing would change it save a judicial decision or new legislation. (R. 2.)

3. That "repeated" protests had, before 1866, been made against the wrong ruling, and by the principal stockholder and treasurer of the claimant corporation, in order to change it, and without avail.

4. That no receipt or return or other paper was ever signed by claimant, except those printed forms prepared by the bureau, and peremptorily required to be signed or used in order to go on with the business, and that claimant was not consulted about and had no option regarding these unless he wholly abandoned his business.

5. That there never was any meeting or conference or consultation regarding, or looking to, a compromise or accord.

6. That there was never any making out of an account by claimant in his own way or words, and no giving of any receipt except the printed one, wholly made up by the government and established by settled practice as form 44. (R. 10.)

7. That the methods of keeping the accounts and doing the business were such as resulted in a "running account," and that the alleged monthly settlements were nothing more than a monthly statement of sales of stamps, commissions allowed, and payments, in which monthly statments the amounts due the government at the end of last month, ascertained on the false interpretation of statute, were carried forward from month to month.

8. That in no single case did the complainant buy and pay for a designated amount of stamps, and payments never corresponded with the quantity ordered. (R. 11.)

Such are the facts.

That these do not make out what this Court says must be made out, to wit: "In order to deprive him of his statutory "right—not *only* facts from which an agreement to do so

"might be inferred, but an *actual* settlement based upon "such understanding," seems to us to be utterly plain.

First observe the *inequality* between the parties dealing—the absolute necessity of the claimant submitting to the government's demands, as to each fact now used against claimant, or else abandoning his business; and observe the bearing of this fact on question of an agreement to waive and on an actual settlement based upon an understanding that he waived his statutory rights.

It was the *inequality* which is made by a government being on one side, assuming, by law, to dominate the claimant's business in such sense and degree that he could not prosecute it, for an hour, unless he implicitly obeyed the government's demands as to *every fact and act* now cited against claimant as making out a free and voluntary waiver of his property rights. If he, for an hour, attempted such prosecution in violation of these peremptory orders, the law made him a felon; and these commands came from officers who had been, for years, remonstrated with and protested against, as to these demands, and who had declared that protests were useless, and that their practice and constructions could only be changed by Congress or the Courts.

If the citizen, bowing to such commands, when his only other alternative was to submit to the total destruction of a great business, built up during years and amounting to millions during the years covered by this case, be a showing of "facts" from which an agreement may be inferred to waive and surrender enormous property rights, and also a showing of "an actual settlement based on such understanding," then we confess to have been unable to find such law in any reported case.

In the brief, at pages 10 and 11, we cite—

Alston *v.* Durant, 2 Strobh., 257.
Boston Co. *v.* Boston, 4 Met., 181.
Morgan *v.* Palmer, 2 B. and C., 729—

which are directly in point as showing that the law does not make such acts, so done under these conditions of inequality,

to be proofs that the citizen assented to a waiver of his statutory rights.

Please bear in mind that our point is not that these facts show "duress" of the person, but that they fail to show precisely what this Court says is incumbent on the Government to show, (105 U. S. R., bottom of p. 695,) that *claimant "was willing "to waive his" statutory "rights,"* and did make settlement waiving them. And more than once this Court has declared that the Court will "*lay out of view the receipts which were given in "order to gain possession of these vouchers,*" *&c.*, (12 Wall., 243; 7 Wall., 479.) And infinitely more will this Court "*lay out of view*" receipts given, and balances stated monthly when these were compelled to be given, not to get possession of vouchers, but in order to be allowed to go on with a business, the abandonment of which was utter ruin, and the destruction of millions of property.

The case of Glass Co. *vs.* Boston, 4 Met., 181–188, is a well considered one, and as applied to the present point, we think it valuable.

There the Court, after stating the general rule that "payment upon a mere demand of money, unaccompanied with "any power or authority to enforce such demand except by a "suit at law," is voluntary and cannot be recovered back, proceeds to say:

"This rule has its exceptions; and the cases are not infrequent, in which the party paying money on an illegal demand, knowing it to be such, when making the payment, has been allowed to recover back the money. If there were a controlling necessity in the case arising from the peculiar circumstances under which the money is demanded the rule does not apply." * * * "A payment of money illegally claimed by a collector, as tonnage duty, or light money, and which the plaintiff paid to obtain a clearance of his vessel, was allowed to be recovered back."

Ripley *vs.* Gleston, 9 Johns., 201.

"So where money was paid to liberate a raft of lumber, detained in order to exact an illegal toll, it was held to be a compulsory payment."

Chase *vs.* Dwinall, 7 Greenl., 134.

"And generally where money is paid to obtain possession of property which the party, making the illegal demand has under his control, such payment will be considered as compulsory."

Shaw *vs.* Woodcock, 7 Barn. & Cres., 73.
Morgan *vs.* Palmer, 7 Barn. & Cres., 729.

"Another case, and the one to which the present case more appropriately belongs, is where payment of money is made upon an illegal demand by one who has authority to levy upon the property of the person upon whom the demand is made, and, by sale of such property, to satisfy and discharge such claim; and when payment is made on such demand, and to prevent such seizure and sale, the payment is also compulsory."

The Court then proceeds to state that the absence of a protest in such cases makes no difference. It says: "This "question seems, however, to have been distinctly presented "in Cotton Mf. Co. *vs.* Inhabitants of Amesbury, 17 Mass., "461. This was an action to recover the amount of taxes "paid by plaintiff from the year 1814 to 1818, inclusive. The "payment for the year 1818 was upon a warrant of distress; "*but the payment for the previous years had been made without* "*protest or any denial of the defendants' right to demand the* "*money; and it was insisted that the payment for the years pre-* "*ceding* 1818" (1814, 1815, 1816, and 1817) "*were voluntary, and* "*being such, the plaintiff could not recover the money thus paid,* "*although it was made to appear that the taxes were illegally de-* "*manded. But the Court held that the voluntary payment of a* "*part of the taxes thus assessed did not affect the right of the plain-* "*tiff to recover the amount of money paid by them upon an illegal* "*assessment.* The obvious reason of this rule, though not "prominently set forth in that case, is clearly stated in the "opinion of the Court in Preston *vs.* Boston, 12 Pick., 7. "It arises from the power and authority placed in the "hands of the collector of taxes, by virtue of his warrant, "to levy directly upon the property or person of every indi-"vidual whose name is borne upon the tax-list, in default of "payment of taxes."

How summary and severe the processes are which the law provides for collecting the illegally assessed taxes imposed on this claimant's business, had he refused to pay any part so illegally assessed, we need not here state.

Sect. 3437, Rev. Stats., gave power to resort to all the modes of enforcing collections of taxes, assessed on articles whereon the tax is paid by stamps, as are authorized "for "the collection of other taxes." Some of these methods are entering on the premises and making the assessments there, &c., (Sect. 3176,) this in day or night, (Sect. 3177) and is made a lien on all debtors property; (Sect. 3186,) and if not paid, all the debtors property, (save school books, wearing apparel, &c.,) can be summarily seized by distraint, and sold for taxes, interest, and five per cent. penalty. (Sects. 3187 to 3206, inclusive.)

So that, as already remarked, there was, to this claimant, absolutely no other choice than either pay these illegal assessments, or else discontinue his business wholly, or refuse to pay his taxes and allow all his property to be seized and sold.

We confess we are at a loss to perceive why such cases as this of Glass Co. *v.* Boston, (4 Met., 188,) and the cases there cited, as that in 17 Mass., 461, are not conclusive of the present case, if good law.

Observe that, in none of the cases, relied on by the Court of Claims, as governing the present one, was this controlling element present, to wit, that the alleged "voluntary settle- "ments and payments" were for, or such as involved, *illegally assessed taxes*, which the assessing officer had summary power to enforce instant payment of, by seizure and sale of the debtors entire estate; and this without suit or day in court, and with severe penalties.

True it is that this action is not one to recover back taxes illegally assessed and paid, but is for a balance of statutory commissions allowed on face value of such stamp taxes, and hence the claim is not one covered by sects. 3226–4227, &c., of Revised Statutes relating to recovery of illegal taxes paid, nor by the cases thereunder cited in Wright *v.* Blakesley, (101 U. S., R. 179.)

But whilst the thing sued for is not illegal taxes involuntarily paid, but is statutory commission allowed as a deduction from taxes, yet this fact does not change the involuntary or compulsory nature of the alleged "settlements" and "payments" and "receipts" which are here found and being used to create an "accord and satisfaction." The commissions sued for were denied us, and their amount was simply *added to, and increased the amount of our taxes demanded* by amounts precisely equal to the commissions thereon unlawfully withheld.

The commissions on the tax, and the amount of tax collectable were, in the modes of the business of the bureau, and in the settlements and returns and receipts thereabouts, correlatives—one grew out of the other; they could not be separated so as that we could settle for one and not for both; and hence when we were compelled to settle and pay for taxes assessed, to an amount in excess of the law, or else suffer seizure and sale of all our estate, we were, therein and thereby, compelled to also suffer these receipts, on form 44, (R. 10) and monthly settlements to be made as they were made, or else to either abandon our business, or to carry it on in violation of law, and suffer a seizure of all our estates. Making these monthly returns on form 55½, and these receipts was, therefore, precisely as much involuntary as was the payment of excessive taxes so increased by an amount equal to our commissions withheld.

In the case of Tutt *v.* Ide, (3 Blatchf., 249,) is a valuable review of many of the cases regarding when payments are regarded as voluntary.

To the cases cited in the brief, holding that payments made under constraint like that under which claimant made the returns on said form 55½, and gave the receipts on form 44 (and which constraint was that if he refused so to obey Government orders his estates would be seized or else his business be abandoned), we wish to add the following authorities:

Ashley *vs.* Reynolds, 2 Strange, 219.

Bales *vs.* Ins. Co., 3 Johns. Cases, 238.
Irving *vs.* Wilson, 4 T. R., 485.
Munt *vs.* Stokes, 4 T. R., 561.
Fleetwood *vs.* City of N. Y., 2 Sanf., S. C. R., 470.
Chase *vs.* Taylor, 4 Harr. & Johns., 54.
Richardson *vs.* Duncan, 3 N. H., 508.
Parker *vs.* Great West. Ry. Co., 7 Mann & Gr., 253.
Parker *vs.* Bristol Ry. Co., Eng. L. & Eq., R. 528.

These last-cited cases are those reviewed by Judge Hall in the case of Tutt *vs.* Ide (3 Blatch, 249), and in a note (3 Blatch., 255) it will be seen that Justice Nelson fully approved this opinion of Judge Hall.

It is submitted that these cases present the settled law on this subject; and that since the "returns" made on form 55½, and the "receipts" given on form 40, and all other acts of the claimant relied on as making out a compromise and voluntary release of his commissions, were made and done under the force of the fact that a refusal to do these acts, as commanded, would have resulted in either a seizure and sale of his estates or else in the destruction and abandonment of his entire business, therefore it is settled law that such acts, so done, are not, in the sense of the law, voluntary, and do not make out an accord.

PROTESTS.

It is claimed that the absence of protests after 1866 shall establish the voluntary nature of claimant's acts.

The replies to this position are obvious. One is that given in the brief, namely, that the protests had been repeatedly made by the treasurer of this company, Swift; that the practice protested against had become so fixed and settled that claimant had been notified by the Commissioner (R., bottom of **p.** 2) that "he would adhere to the long-established practice of his office unless there was some legislation or judicial decision to change it," and therefore further protests were "vain things."

The change of the business, so conducted by Swift & Co., from being done by a partnership, to being done by the same parties, at the same place and in the same way, by a corporation, did not deprive the parties, as a corporation, of the protests which they made when not a corporation.

The force of the protests continued all through these years. They had been repeatedly made by all such manufacturers (R., 44); had been ineffectual; the practice had stood since the organization of the bureau, and therefore the absence of protests during the years 1870 to 1878 had no tendency to show that these "*repeated protests*" had been withdrawn, or the wrongs done, through the false construction of the law, were being acquiesced in.

Therefore all these acts of claimant, in making returns and giving receipts, were done, in contemplation of law, under the continuing force of "*repeated protests.*"

The other reply to this contention that our alleged monthly settlements were "voluntary" and make an "accord," is the obvious one given in the cases cited from—

Amesbury Woolen Mf. Co. *vs.* Amesbury, 17 Mass., 461.

Glass Co. *vs.* Boston, 4 Met., 189.

and other like cases.

That reply is this: That, throughout all these years, from 1870 to 1878, the constraint continued, which compelled us, under the pain of suffering a seizure and sale of all our estates, to either submit to do the acts required of us, in making precisely these specific returns and receipts, or else to abandon our business. And hence none of these acts, so done under such constraint, were acquiescence, or compromise, or settlement, or voluntary, or accord.

Our case, in this feature, is precisely like the one in the case from 17 Mass., 461, in the respect that for the years 1814, 1815, 1816, and 1817 the taxes were paid because they could be enforced by summary seizure, and were therefore held involuntary. But our case is much stronger than this Mass. case, as against ours being treated as voluntary, be-

cause from 1814 to 1817, inclusive, the taxes had been paid "*without protest or any denial of the defendants' right to demand* "*the money*," (see 4 Met., 189,) and no protest or denial had ever been made prior to 1818.

But in our case all the acts relied on as making out an accord were done under the continuing force of the "*repeated* "*protests*" of the preceding years.

WERE NO SETTLEMENTS.

But we utterly deny that these monthly returns, made on Form 55½, are monthly settlements. They are simply enforced and prescribed monthly "returns" required in the routine of business as established in the bureau. There was, in law, but one party to their form and getting up, and that was the Commissioner. He *commanded*, and commanded, with power of seizure, of summary sale, of breaking and entering our houses, of imprisoning, &c., &c., in case we did not bow to his command. There was, at these so-called "settlements," no meeting of either men or minds.

Besides this there could be no such monthly settlements, because the credits of 60 days allowed were expiring at all sorts of times, and "settlements" (in any other sense than that of mere "returns" or book entries) were, in the very nature of the case impossible.

The truth is that the facts found do not change these transactions from being what this Court says the facts in the petition make it to be, namely, "a running account," where the unmatured credits given in the preceding months are carried forward, on form 55½, into the "return" for the month which was being returned.

THE DELAY OF SUIT.

Stress is laid on the years that elapsed before claimant sued in this case. This is pointed to as making "acquiesence."

This delay, taken by itself, is, by the law, visited with prescribed consequences, to wit, (in a case where it applies) by

the six years' limitation. It is by the law when viewed alone, visited by no other penalties.

In the case of such running account as this I submit that no part of the claim is barred. But be that as it may, I submit that, because the citizen has, as well he might, shrunk from the really fearful business of a law suit with his government, this shall inflict upon him no other penalties than the one prescribed by the statute of limitations.

SAMUEL SHELLABARGER,
For Claimant.

111-22

SUPREME COURT, U. S.
FILED
MAR 5 1884
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

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BRIEF FOR THE UNITED STATES.

Three points appear to have been considered by the learned court below :

1. The meaning of the statute of 1862, as amended in 1863 ;
2. The existence and effect of the protest ; and
3. The bearing of the statute of limitations.

These points will be briefly discussed, the Opinion below being adopted otherwise as a brief for the Government.

1. The meaning of the statutes of 1862 and 1863 was considered by this court when the case was here before upon demurrer.

It may not be necessary in the present state of the case, and in regard to that alone, to take that topic up again; but inasmuch as an *issue* thereupon seemed *to have been waived* formerly in the pleadings and opinion below, and likewise in the argument here, and as a number of these cases are upon the record below, which seem to involve no other question but that of the interpretation of these acts, the learned Court of Claims hopes that it may be within the power and the pleasure of this Court again to consider that topic as *upon a conflict* between the parties as to the meaning in question. If it be, there will be no occasion for bringing up any other case upon this subject.

What is so clearly and succinctly said in the Opinion below as to this point leaves nothing more to be said profitably.

2. This is a case in which there is no *statutory* right of protest.

(*a.*) One question therefore is, whether the maxim which allows private persons upon paying money to their creditors to give it *a specific destination* so that the creditor is put to an *election* either to receive it *as it is given* or to *refuse it* and rely upon his legal rights, applies as well to persons who on behalf of the Government make payment to private persons; *or*, whether in the latter case a protest against such direction to apply will annul its ordinary effect

Croft *vs.* Lumley, 4 Ellis & B., 682; and also 6 H. L.,

672, may be cited for the *ordinary* doctrine in a case with features like those here. Lumley owed Croft, and paid him, a sum of money expressly *as rent* upon a house the lease of which the former had then *forfeited*. Croft took the money, saying that he did not receive it *as rent* but as compensation for something else.

Lord Campbell, in giving judgment, said that notwithstanding Croft's *resolute* assertions as above, the case was one for the application of "the established maxim of law that where money is paid it is to be received according to the expressed will of the payer, not of the receiver."

In the House of Lords the Judges were summoned, and seven out of eight (Crompton, Diss.) concurred with Lord Campbell, their views being substantially those expressed by Baron Channell, as follows:

> "What he *did*, not what he *said*, was in my opinion the all-important matter. He should have declined to take the money at all, if he meant to elect to proceed for a forfeiture."

Upon this point of the case therefore it is submitted that if the present were a contention between private parties the company would be estopped to deny that they had received the *ten per cent. in stamps* otherwise than as a *satisfaction* of their commissions. The record shows that they were fully apprised of the application to which the agents of the Government destined such *ten per cent. in stamps*, and that they sought to protect themselves against its effect by a protest.

I submit that one advantage which the Government is entitled to for having subjected itself to suit in the Court of

Claims as if a private person, is that it is entitled to be regarded as a private person in matters within the maxim above alluded to. The contractor has a right to vindicate his legal rights by suit, and therefore may be put to an election (either to *take as given*, or to *sue* the Government) equally as if he were dealing with a private person. If, as regards a private person he is supposed to have shut himself off from an investigation of the original question in a court of law by receiving the money, even although he do it as ancient Pistol did in the case of the leek—"I *eat*, but eke I *swear!*"—why is there not the same exclusion in the case of the Government?

The persons with whom Government contractors deal are not roused by the sentiment of self-interest to take ground against the latter, as private dealers are. As a matter of fact these officials ordinarily deal with great liberality, and the chances are, considering the sentiments which animate either side, that, upon the whole, the Government loses more than it gains by the practical interpretations which its officials place upon the contracts, statutes, &c., that regulate their dealings with contractors. Supposing the parties to be equally honest, this result will follow from the existence of a spur upon one side that is wanting upon the other—a *spur* which exists *upon both sides* in ordinary dealings.

Nor is the circumstance that contracts with the Government are generally so large or so protracted in execution any reason for making such a distinction. Very extensive and very protracted contracts also exist amongst private parties. Indeed the balance betwixt the *sum* of the respective *times and amounts* of the very large private con-

tracts constantly being executed within the United States, and that of the *times and amounts* of the contracts with the United States themselves, must be greatly against the latter. If, therefore, the person who receives money to which a condition is expressly prefixed by the payer, is bound thereby, even though he protested against such condition, *because* he might have refused and referred the dispute to a suit at law, the same result should attend the receipt of money under like circumstances from an agent of the Government. For the same refusal and reference is practicable there also.

Nor does it make any difference that in cases like the present it is the meaning of *a statute* that is under consideration, whereas in ordinary cases it is that of a mere *contract*, for the rules for interpreting statutes are substantially the same as those for interpreting contracts; and, moreover, statutory words in cases like the present become words of contract merely. It is not as of a *law* that the interpretation is made, but as of an engagement betwixt the United States and a particular private person, evidenced by words that are contained in a statute. About the meaning of these words the United States (represented by one of its agents) and the contractor have differed, and during the time of that difference certain acts have been done; what is now contended for is that to such acts *their usual commercial character* should be attributed on behalf of one party as well as of the other.

It seems manifest that any views of such transactions taken by the courts before the establishment of the Court of Claims *as a court*, do not apply since such establishment; and also that casual allusions in *the books* to the probable

effects of *protests* in such cases, will not prevent the court from considering the question as new. Unless indeed, as may be, language of the court in the cases of Savage (92 U. S., 382), and McElrath (102 U. S., 426), which refer to like protests as *inoperative*, indicate the better opinion, and show the present suggestion to be not only not new but accepted.

In Savage's case, the claimant had demanded *gold* upon certain Government bonds which were being paid at the Treasury, and protested against receiving "currency." He however received the latter and surrendered his bonds. Upon the point as to the effect of the protest, the Court said that it could not countervail that of the contemporaneous *act* of surrender of the bonds; that in such dealings it was necessary for the validity of a protest that it should be sanctioned (as it had been in the similar instances of payments for duties and for internal revenue) by an express statute.

In McElrath's case, the claimant had received a certain sum under protest against its being a satisfaction, and afterwards brought suit for the alleged balance. For good reason, as appeared in the event the United States forbore to plead the settlement. The Court makes an express allusion to the fact that the United States "declined to plead the *settlement* of 1874 in bar of the suit."

It is submitted therefore that in point of authority the court is not bound to treat the protest here as having any effect.

(*b.*) So far it has virtually been admitted that there has been a valid protest as regards the subject-matter of this

suit. This has been done, however, only for the purpose of this argument, for it is submitted that the record shows no protest of any sort.

The protest relied upon was made before June 30, 1866, some four years previously to the creation of the company now making claim; but in the course of like dealings by leading manufacturers of matches, and amongst them a person afterwards one of the principal stockholders and the treasurer of the company.

The court will take notice that such protest was not made *after* the time of Commissioner Rollins, and that in 1870, at the time when the dealings of this company began, Mr. Delano was Commissioner, and that after him, up to the year 1878, Messrs. Pleasanton, Douglas, Pratt, and Raum had succeeded.

Although these successors were bound by rulings of Mr. Rollins upon accounts during his time, (unless more evidence were adduced, &c.), yet as to subsequent accounts preferred by even the same parties, and much more as to such accounts by different parties, those rulings were not binding.

It also appears that this ruling was, in the judgment of this Court, (105 U. S. p. 695) *clearly* wrong; so wrong as even to afford no color for the defense of "contemporaneous construction."

If the view of Commissioner Rollins was wholly unfounded the Court will not attribute a concurrence therein to officers whose attention has never been drawn to it.

The real question is not whether in effect the successors are chargeable with having administered that rule, but whether they did so after their attention had been duly called to it by a challenge of its propriety.